

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

**In Re: MidAmerican Energy Company    )**  
**Verified Petition for Declaratory Ruling    )       Docket No. 03-0659**

**OPPOSITION OF THE CITIZENS UTILITY BOARD AND THE PEOPLE OF THE  
STATE OF ILLINOIS TO MIDAMERICAN ENERGY COMPANY'S PETITION FOR  
INTERLOCUTORY REVIEW AND REQUEST FOR GUIDANCE**

Pursuant to Section 200.220 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), the Citizens Utility Board ("CUB") and the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois ("the People"), submit this Response to the Petition for Interlocutory Review and Request for Guidance ("the Petition") filed by MidAmerican Energy Company ("MEC") on September 3, 2004.

**BACKGROUND**

On August 18, 2004, the Administrative Law Judge ("ALJ") issued a Notice requesting that the parties to this proceeding brief two questions regarding sales of natural gas made by MEC's "competitive division":

1. Assuming for purposes of this filing that MidAmerican Energy Company's factual assertions in its August 16, 2004 response are accurate, is Section 7-102(E) of the Public Utilities Act applicable to MidAmerican Energy Company's competitive gas contracts within its traditional service area? Explain your answer.
2. If the answer to the above question is "yes," does the applicability of Section 7-102(E) mean that the Public Utilities Act should be construed to permit MidAmerican Energy Company to engage in competitive gas sales within its traditional service area, as it has in the past? Explain your answer.

On September 1, 2004, MEC, the Illinois Commerce Commission Staff, ("Staff") and the People and CUB filed initial briefs responding to the ALJ's questions. On September 8, 2004 MEC,

Staff, and the People and CUB filed reply briefs responding to the initial briefs on the ALJ's questions.

On August 16, 2004, MEC filed a motion to stay this proceeding until the conclusion of the General Assembly's upcoming fall legislative session. On August 23, 2004, the Staff and the People and CUB filed responses opposing MEC's motion. On August 25, 2004, MEC filed its reply. The ALJ denied MEC's motion on August 30, 2004.

MEC filed its Petition asking the Commission: 1) to reverse the ALJ's August 18 Notice on Rehearing ("the August 18 Notice"), 2) to reverse the ALJ's August 30 Order Denying MEC's motion to stay ("the August 30 Order"), and 3) to grant MEC guidance regarding in what proceeding MEC can pursue its due process rights before the Commission. For the reasons stated below, the People and CUB believe that the Commission should deny MEC's petition for Interlocutory Review, and: 1) leave the ALJ's August 18 notice undisturbed, 2) leave the ALJ's August 30 Order undisturbed, and 3) commence the proceedings in ICC Docket No. 04-0392.

### **INTRODUCTION**

The Commission should deny MEC's Petition and allow this proceeding to continue in earnest to resolve the sole issue on rehearing: whether Sections 7-102(D) and (E) apply to MEC's "competitive" natural gas commodity sales within its traditional service area. MEC argues in its Petition that the ALJ is improperly transforming, on rehearing, a declaratory ruling proceeding into an evidentiary "show-cause" proceeding, and that the ALJ improperly denied MEC's motion to stay this proceeding. MEC Petition at 3-4. MEC also argues that the Commission is denying MEC due process. *Id.* at 4.

CUB and the People disagree with MEC's arguments. CUB and the People note at the outset that the Commission has already issued a declaratory ruling in this proceeding that states

that a public utility in Illinois cannot do what MEC seeks to do, namely make unregulated sales of natural gas commodity through a division of the utility. Declaratory Order, *MidAmerican Energy Company Petition for Declaratory Ruling*, ICC Docket No. 03-0659 (May 11, 2004). Under the Commission's Rules of Practice, Declaratory Rulings are not appealable. 83 Ill. Admin. Code §200.20. The only reason this proceeding appears unusual is because MEC chose to engage in "competitive" sales of natural gas commodity of dubious legality for nearly a decade *before* seeking clarification from the Commission. MEC's Petition represents nothing more than an impermissible collateral attack, which the Commission should dismiss, on the Commission's Declaratory Order. MEC's past failure to clarify the legality of its conduct is insufficient to delay the resolution of this case and stop the Commission from completing rehearing. As a result, MEC's arguments in support of its Petition do not withstand scrutiny. The ALJ properly limited the scope of rehearing to a single issue. The ALJ also properly denied MEC's motion to stay this proceeding. Finally, MEC is a party to ICC Docket No. 04-0392, and can avail itself to all due process there as the Commission determines what, if any, penalties MEC should face for apparently violating the law for almost a decade.

## **ARGUMENT**

### **I. The ALJ's August 18 Notice Properly Set Forth the Scope of Rehearing.**

The ALJ's August 18 Notice properly set forth the scope of rehearing in this declaratory ruling proceeding. The August 18 Notice requested all parties to brief the questions of whether Section 7-102(E) of the Public Utilities Act ("the Act" or "PUA") applied to MEC's "competitive" sales of natural gas commodity by a division of the utility, and, if so, whether the Commission should construe the Act to permit MEC to engage in those types of sales within its

service territory. The August 18 Notice also permitted other parties to challenge the facts that MEC advanced in its Response and Objection to Rehearing.

Contrary to MEC's arguments against the ALJ's August 18 Notice, declaratory ruling proceedings do not result in advisory opinions; they declare the rights of parties and allow for examination of facts. MEC's Petition is also an impermissible collateral attack on the Commission's Declaratory Order, which, under the Rules of Practice, MEC cannot appeal.

**a. Declaratory Ruling Proceedings Declare the Rights of Parties and Allow for the Examination of Facts.**

Declaratory ruling proceedings declare the rights of parties. MEC has argued, without citing any authority, that such proceedings are merely "advisory" not "adjudicatory." MEC Memorandum In Support of Petition for Interlocutory Review and Request for Guidance (hereafter "MEC Memo") at 4. However, the weight of Illinois case law shows otherwise. When deciding declaratory judgment proceedings, Illinois courts do not render advisory opinions. *See Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 362 N.E.2d 298 (1977); *Greenberg v. United Airlines*, 206 Ill. App. 3d 40, 563 N.E. 2d 1031 (1st Dist. 1990) *cert. denied* 137 Ill. 2d 664, 571 N.E. 2d 148 (1991); *Outboard Marine Corp. v. James Chisholm & Sons*, 133 Ill. App. 3d 238, 478 N.E.2d 651 (2<sup>nd</sup> Dist. 1985).

Declaratory ruling proceedings also allow the examination of facts. *See* 83 Ill. Admin. §200.20. However, MEC argues in its in Memo, again without citation to any authority, that "a declaratory ruling proceeding is such that no evidentiary record is created. . ." *See* MEC Memo at 4. MEC has apparently forgotten that its initial Petition for Declaratory Ruling included verified facts. MEC stated: "[i]n its Verified Petition filed in the Declaratory Ruling Proceeding, [MEC] provided verified facts needed for the Commission to declare its legal conclusions regarding the three questions posed by [MEC]." *See* MEC Combined Application for Reh'g and

Request to Revoke Orders (hereafter “MEC App. for Reh’g”) at 3. The Commission’s Rule of Practice governing declaratory rulings, Section 200.220, expressly allows the Commission to examine facts relevant to the declaratory ruling requested. 83 Ill. Admin. Code §200.220. MEC’s own prior actions and the Commission’s Rule clearly show that the Commission has the ability to consider facts relevant to the declaratory ruling. It is, therefore, entirely appropriate that the August 18 Notice permit the Commission to consider on rehearing facts relevant to the sole remaining issue in this proceeding. It is also entirely appropriate that the ALJ accord the other parties to the proceeding due process through some opportunity to challenge those facts. Lastly, courts in Illinois have held that declaratory judgments should not be restricted by unduly technical interpretations. *See Minica v. Area Interstate Trucking, Inc.*, 250 Ill. App. 3d 423, 430, 620 N.E.2d 1328, 1334 (1st Dist. 1993) *citing Kluk v. Lang*, 125 Ill. 2d 306, 531 N.E.2d 790 (1988). Thus, the ALJ’s August 18 Notice properly allowed the examination of facts. MEC’s inability to accept a negative outcome to its petition for declaratory ruling is not sufficient grounds to overturn the ALJ’s proper August 18 Notice.

**b. MEC’s Petition Is an Impermissible Collateral Attack on the Commission’s Declaratory Ruling Which Is Not Appealable.**

MEC’s Petition is actually a collateral attack on the merits of the Commission’s Declaratory Order. However, the Commission’s Rule on Declaratory Rulings expressly forbids appeals of such orders. 83 Ill. Admin. Code §200.220.

MEC claims that “[t]he substantive and procedural scope of the August 18 Notice bears no relation to any ruling [MEC] could have contemplated when it initiated the instant declaratory ruling proceeding in October 2003.” MEC Memo at 3. As a result, MEC has asked the Commission to “reconsider the proceeding as it stands today” and “reverse the August 18 Notice.” MEC Memo at 5. But, MEC certainly should have contemplated, when it filed its

initial petition, the possibility that the Commission would not agree with its interpretation of the law. Not satisfied with the Declaratory Order, MEC now essentially argues, in contradictory fashion, that: 1) it presented facts in its initial petition for declaratory ruling that the Commission did not properly consider in its Declaratory Order, 2) that the Commission should not now consider facts on rehearing, and 3) MEC should be allowed the opportunity to present “a full and complete record prior to the Commission reaching any final conclusion.” MEC App. for Reh’g at 11; MEC Memo at 4-7; *Id.* at 10.

MEC’s argument amounts to an impermissible attempt to appeal the merits of the Commission’s Declaratory Order. The Commission’s Rule on Declaratory Rulings clearly states: “[d]eclaratory rulings shall not be appealable.” 83 Ill. Admin. Code §200.220. The Commission should recognize MEC’s attempt to reverse the ALJ’s August 18 Notice for what it is and deny MEC’s request. Indeed, MEC’s Petition is nothing more than an attempt to stall this proceeding in the hopes of a legislative rescue of its illegal “competitive” sales.

## **II. The ALJ’s August 30 Order Properly Dismissed MEC’s Motion To Stay.**

The ALJ properly denied MEC’s August 16 Motion to Stay. MEC’s motion asked the Commission to stay a proceeding in which an order has been issued and a very narrow issue remains on rehearing. MEC’s reason for requesting a stay was that the General Assembly **might** override a gubernatorial veto, and that the law enacted via this override **might** have some impact on this proceeding. The ALJ, in denying this motion, properly recognized that MEC’s request for a stay was dependent on too many unlikely occurrences coming together and that such hypothetical possibilities should not impact the applicability of Commission Orders.

MEC’s request for a stay was properly denied for the following three reasons. First, the legislation in question, Senate Bill 2525, (“SB 2525”) is not law. Accordingly, it has no effect

on the Order already issued in this proceeding. Second, although SB 2525 passed the General Assembly last session, it was vetoed by the Governor and the likelihood of an override is remote. Third, even if the veto was overridden and the bill was enacted into law, that law would only apply prospectively. It would not operate retroactively to turn illegal activity in the past into legal activity. 5 ILCS 70/4. Accordingly, issues in this proceeding concerning MEC's illegal activities in the past would not be mooted.

**a. SB 2525 Does Not Moot This Proceeding. SB2525 Is Not Law And Does Not Impact Existing Commission Orders.**

Contrary to MEC's arguments, the Commission's Order resolving docket No. 03-0659 is not impacted in any way by pending legislation. Though the General Assembly passed Senate Bill 2525, the Governor vetoed it. Therefore, since SB 2525 has not been enacted into law, it has absolutely no force of law. The mere fact that this Bill could become law in the future is too remote and does not provide a sufficient reason for the Commission to keep its proceeding and implementation of the terms of one of its Orders on hold.

**b. It Is Impossible To Know If The Governor's Veto Will Be Overridden.**

MEC asserted that the support SB 2525 received in the General Assembly indicates that the veto is likely to be overridden. MEC Motion To Stay at 2. This is pure speculation. It is impossible to know how the General Assembly will vote if there is an attempt to override the veto. The Commission should not delay its proceedings and the applicability of one of its Orders on the remote possibility of a veto override, especially when there is no way to gauge the likelihood of such an override. To do so would drag out this proceeding, and would potentially back the Commission into a situation where, after staying the proceeding for weeks, it has very little time to develop a record to resolve the outstanding issues in the rehearing portion of this docket, which is limited by statute to 150 days. 220 ILCS 5/10-113.

**c. Even If the Pending Legislation Becomes Law It Would Not Moot the Instant Proceeding Because It Would Only Apply Prospectively.**

Even if the General Assembly overrides the Governor's veto and SB 2525 actually becomes law, it will only apply prospectively. The Commission's Declaratory Order previously concluded that the Public Utilities Act ("the PUA" or "the Act") prohibited a division of MEC from making competitive natural gas commodity sales to customers both within and outside of the utility's service territory. Declaratory Order at 25. In the unlikely event that the Governor's veto is overridden and SB 2525 takes effect, it will amend the PUA to allow a utility fitting certain criteria to make competitive sales of natural gas commodity from a division of the utility.

MEC has argued that SB 2525 "will clarify the Act's treatment of competitive gas sales by utilities in Illinois and render moot the instant proceeding before the Commission." MEC Motion To Stay at 2. In essence, MEC argues that SB 2525 will apply to MEC's past, present, and future competitive sales of natural gas commodity and nullify the Commission's Declaratory Order.

But SB 2525 would not, if enacted into law, override the Commission's Declaratory Order. Instead, SB 2525 would amend the PUA by adding a new Section 7-210 that allows gas utilities to make certain unregulated retail sales on a going forward basis as follows:

The provisions adopted by the Commission shall permit a gas utility to offer unregulated retail sales of natural gas in the State through the same business division of the utility that offers competitive electric power and energy to electric delivery service customers.

SB 2525, 93d Gen. Assem., Reg. Sess. (Ill. 2004) at §7-210(i). SB 2525 is notably silent on the legality of MEC's past competitive sales of natural gas commodity. SB 2525 makes no mention of an intent to have retroactive effect. It only says:

This Section shall not be interpreted to invalidate any contract for unregulated sales of natural gas executed by a gas utility prior to the effective date of this amendatory Act of the 93rd General Assembly, but unregulated sales of natural gas pursuant to such contract after the effective date of this amendatory Act of the 93rd General Assembly shall be subject to the provisions of this Section.

*Id.* at §7-210(b). Absent a clearly indicated intent to the contrary, the Illinois Supreme Court has held that amendatory legislation *cannot* have retroactive application. *See Caveney v. Bower*, 207 Ill. 2d 82, 90 (2003) (*citing Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27 (2001)).

Additionally, the following language in the Illinois Statute on Statutes prohibits retroactive application of statutory amendments that are substantive rather than procedural: “those that are procedural in nature may be applied retroactively, while those that are substantive may not.” *Id.* at 92 (*citing* 5 ILCS 70/4). MEC argued in its Motion and in its earlier Combined Application for Rehearing and Request To Revoke Orders, that SB 2525 moots this proceeding by demonstrating that express statutory authority was not needed to engage in competitive sales of natural gas commodity. MEC App. for Reh’g at 5, 7, 21, fn. 8. MEC, in effect, asserted that when SB 2525 becomes law, it will make legal past conduct that the Commission has already deemed was illegal under current law in its Declaratory Order. Clearly, MEC’s position would mean that the Commission would have to apply the new Section 7-210 retroactively in a substantive, and not procedural, way. Just as clearly, such a retroactive application of a statutory amendment is forbidden by Section 4 of the Statute on Statutes. 5 ILCS 70/4. Therefore, in the unlikely event that SB 2525 becomes law, the Commission can only read SB 2525 to have a prospective effect.

As the People and CUB have shown, SB 2525 is not law. It is impossible to predict if it will become law. Furthermore, if it does become law through an override of the Governor's veto, it would only apply prospectively and would not render this proceeding moot. Without this justification of potential mootness, MEC presented no basis for seeking yet another delay in this proceeding in the hopes of a legislative "solution" to its past illegal conduct, and the ALJ properly denied its motion.

### **III. MEC Can Avail Itself of All Process Due to It In ICC Docket No. 04-0392.**

MEC argues in its Petition that this proceeding that has exceeded the "parameters" of a declaratory ruling proceeding, thereby depriving MEC of its due process rights. MEC Memo at 4. The Commission initiated Docket No. 04-0392 specifically to address MEC's due process concerns expressed earlier in this proceeding. Despite the fact that the Commission has already addressed MEC's due process concerns by initiating a separate proceeding, MEC continues its efforts to redefine 03-0659 as if it is due more process in the proceeding than it received. As demonstrated below, MEC has already received more than the due process to which it is lawfully entitled in Docket 03-0659. MEC can avail itself of any additional process it is due related to determinations made in Docket 03-0659 in Docket 04-0392, the docket established specifically for that purpose.

#### **a. The ALJ Granted MEC More Process Than Was Due On Rehearing, Not Less.**

The ALJ has granted MEC more process than is normally afforded in a declaratory ruling proceeding by issuing a Proposed Order and permitting opportunities to respond, and by asking for additional factual information before reaching a decision on rehearing. The Commission's rules with regard to rehearing authorize the Commission, in its sole discretion, to dispose of a request for a declaratory ruling solely on the basis of the written submissions before it. *See* 83

Ill. Admin. Code §200.220. The “written submissions” described in the rule are the petition for a declaratory ruling and any responses filed. *Id.* Accordingly, the Commission can make a final determination regarding a declaratory ruling request based on these documents alone. Though neither Proposed Orders nor opportunities to respond are required, the ALJ provided both. The ALJ would have been following proper Commission procedure to answer the questions presented without providing any opportunity for response.

Additionally, the Commission Rules regarding declaratory rulings clearly state that a petition for a declaratory ruling shall contain all necessary facts, a description of the controversy to be resolved, and citation to relevant authority:

- b) A request for a declaratory ruling:
  - 1) shall be captioned as such and shall contain a *complete statement of the facts* and grounds prompting the request, ...; a *clear, concise statement of the controversy or uncertainty that is the subject of the request*; the requester's proposed resolution of that controversy or uncertainty; and citations to *any statutes, rules, orders or other authorities* involved;

83 Ill Adm. Code at §200.220 (emphasis added). Requiring all of this information in the original request for a declaratory ruling ensures that the Commission receives all information it needs in order to act on a request based upon the request itself. Thus, the Commission could have resolved the rehearing phase without seeking additional facts, but instead exercised its discretion and provided additional due process to MEC, allowing it to present facts to support its position. ALJ did not have to seek additional facts from MEC at the start of the rehearing phase of this case. By doing so, the ALJ provided more process than a party initiating a declaratory ruling proceeding would normally be entitled to.

**b. The Commission Must Proceed with ICC Docket No. 04-0392 at Least Because MEC's Competitive Contracts Outside of Its Service Territory Are outside of the Scope of Rehearing.**

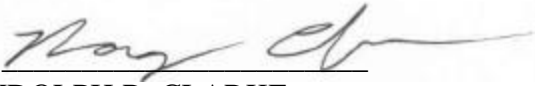
ICC Docket No. 04-0492 can and should move forward independently of the rehearing phase of Docket No. 03-0659 because it contains issues that are outside of the scope of rehearing in Docket No. 03-0659. Docket No. 04-0492 deals with applying legal conclusions reached in Docket No. 03-0659 to MEC's commercial natural gas sales both **within** and **outside** of MEC's traditional service area. The issue on rehearing in Docket No. 03-0659 is limited to a legal determination with regard to MEC's contracts **within** its traditional service territory. The scope of Rehearing in Docket No. 03-0659 is silent regarding MEC's operations outside of its traditional service territory. Accordingly, since no part of the rehearing phase of Docket No. 03-0659 deals with MEC's operations outside of its traditional service area, Docket No. 04-0392 must proceed with regard to those operations.

**CONCLUSION**

WHEREFORE, for the foregoing reasons CUB and the People respectfully request that the Commission deny MEC's Petition and affirm the ALJ's August 18 Notice, affirm the ALJ's August 30 Order denying MEC's motion to stay, and commence the proceedings in ICC Docket No. 04-0392.

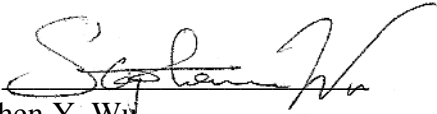
Respectfully Submitted,

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Dated this 10th day of September 2004.